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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 541.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, Deceased, *et al.*,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA, MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE

OPINIONS OF THE STATE COURTS

The opinion of the Surrogate (R. 66) is reported in 163 Misc. 667. No opinion was rendered by the Ap-

pellate Division of the Supreme Court in affirming the order of the Surrogate. The opinion of the New York Court of Appeals (R. 86) is reported in 281 N. Y. 297.

JURISDICTION

The judgment of the Court of Appeals was rendered July 11, 1939 (R. 84). The appeal to this Court was taken October 10, 1939, and probable jurisdiction was noted by this Court in an order dated December 11, 1939. The jurisdiction of this Court is claimed under section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928.

STATEMENT

Cornelius Vanderbilt, donor of the power of appointment exercised by Alice Vanderbilt, the decedent herein, died a resident of the State of New York on July 12, 1899 (R. 22). By his will he provided that a trust fund should be set up by his executors to pay his wife the sum of $250,000. annually. It was also provided that, at the death of his wife, the principal of the trust should be paid to four of their children in such amounts as she should appoint by her will. In default of appointment, the trust fund was to be paid to such children share and share alike, the issue of any deceased child to take their parent's share (R. 40).

Alice Vanderbilt died a resident of New York State on April 22, 1934 (R. 9). By her will she appointed the principal of the said trust among the survivors of the aforesaid children and the issue of two of said child-

dren who had predeceased her (R. 30). It was decedent's appointment, not merely the extinction of her life estate, as appellants assert, which gave the appointed property to her children.

The value of the trust fund at decedent's death was $5,935,572.07 (R. 24). Said amount, less the value of the property taken by remaindermen who took a smaller amount under the exercise of the power than they would have taken in default of the power (see *Matter of Duryea* (1938), 277 N. Y. 310), or $5,285,572.07, has been included in decedent's estate for the purposes of the estate tax imposed under Article 10-C (sections 249-m to 249-mm) of the Tax Law of the State of New York (R. 7).

The inclusion of the above amount in decedent's estate has been upheld without judicial dissent by the Surrogates' Court of New York County, the Appellate Division of the Supreme Court, and the Court of Appeals of the State of New York.

THE STATUTES INVOLVED

The first death tax in New York was enacted by Chapter 481 of the Laws of 1885. By said chapter a tax was imposed on testamentary transfers, including the transfer of property subject to a power of appointment, whether general or limited (*Matter of Stewart* (1892), 131 N. Y. 274). Under this law the exercise of a power of appointment was not subject to tax (*Matter of Harbeck* (1900), 161 N. Y. 211). Chapter 284 of the Laws of 1897, amending section 220 of the Tax Law, provided that the exercise of a power of ap-

pointment should be taxed as if the appointive property were owned by the donee of the power. This statute exempted property passing under the exercise from a tax in the estate of the donor. It was in effect at the time of the death of Cornelius Vanderbilt, and provided as follows:

> "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The above statute was construed to apply to limited as well as general powers (*Matter of Dows* (1901), 167 N. Y. 227, affirmed *sub. nom. Orr v. Gilman* (1902) 183 U. S. 278; *Matter of Delano* (1903) 176 N. Y. 486, affirmed *sub. nom. Chanler v. Kelsey* (1907), 205 U. S. 466).

Subsequently, it was held that chapter 284 was unconstitutional in so far as it attempted to impose a tax on the nonexercise of a power (*Matter of Lansing* (1905), 182 N. Y. 238), and accordingly, the provision for taxing the nonexercise of powers was eliminated (Chapter 732, Laws of 1911). This left the transfer of property under a power of appointment which was not exercised taxable in the estate of the donor.

By Chapter 320 of the Laws of 1925, the Legislature enacted Article 10-B of the Tax Law, imposing a supplemental tax designed to take up the credit for State taxes allowed by the Federal Estate Tax Law. Under Article 10-B, (Sections 249 to 249 l), an estate tax was imposed in estates of a certain minimum, and there was included in determining the taxable estate, the amount of all property of a decedent, including property transferred subject to a power of appointment.

It having been held that the exercise of a power of appointment created by a resident decedent was not subject to tax where the donee died a nonresident, (*Matter of Fearing*, (1911), 200 N. Y. 340), Chapter 357 of the Laws of 1926 amended section 220 of the Tax Law to provide that such transfers should be taxed in the estate of the donor.

In 1930, the estate tax presently imposed under Article 10-C of the Tax Law was substituted for the earlier taxing articles in respect of decedents dying thereafter (Chapter 710, Laws of 1930). Under Article 10-C, property transferred subject to a power of appointment, whether general or limited, is included in the donor's gross estate (section 249-r (1), Tax Law), and

property passing under the exercise of a *general* power of appointment is included in the donee's gross estate (section 249-r (7), Tax Law). However, as originally enacted, Article 10-C made no provision for including in a donee's estate property passing under the exercise of a *limited* power. In this state of the law, property passing under the exercise of a limited power created when the law provided that the tax should be imposed in the estate of the donee upon the exercise, was not taxable in either the donor's or the donee's estate. To close this gap, the Legislature added subdivision 7-a to section 249-r of the Tax Law (Chapter 320, Laws of 1932, effective March 21, 1932). It is this statute, the validity of which is here attacked.

Subdivision 7-a provides as follows:

"§ 249-r. Gross estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, * * *.

"7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax

on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The purpose of the amendment is clear from the explanatory memorandum submitted by the State Tax Commission (R. 53). Appellants would make it appear that the Legislature enacted subdivision 7-a without being aware of its full meaning. They suggest that the statute was passed perfunctorily and that the memorandum was submitted only to the Governor. This is not the fact, for following a long-established practice, the memorandum was submitted to the respective tax committees in the two Houses of the Legislature, as well as to the majority and minority leaders of both Houses.

Appellants distinguish between the tax imposed under Article 10C and the tax imposed prior to 1930 under Article 10 (sections 220 to 245) of the Tax Law. The distinction is correct, in so far as it concerns the method of computing the tax on the basis of the amount received by an individual under Article 10 and on the basis of the amount of the entire estate transferred under Article 10-C. However, appellants err in describing the Article 10 tax as a tax on the right to *receive* property. The tax was on the right to *transfer* property. The taxing article is denominated "Taxable Transfers." See also *Keith v. Johnson* (1926), 271 U. S. 1; *People ex rel. Home Trust Company v. Law* (1923), 204 App. Div. 590, aff'd 236 N. Y. 607; *Matter of Keeney* (1909), 194 N. Y. 281, 284, aff'd *sub nomine Keeney v. New York* (1912), 222 U. S. 525; *Matter of Merriam* (1894), 141 N. Y. 479, aff'd *sub nomine United*

States v. Perkins (1896), 163 U. S. 625; Handy, *Inheritance And Other Like Taxes*, p. 42.

Appellants seem to place reliance on the fact that no Federal estate tax is imposed with respect to the exercise of limited powers of appointment. This, of course, does not prove any lack of congressional power to impose such a tax. Moreover, it should be observed that Congress has not been confronted with the same situation as arose in New York by reason of the transition from the transfer tax to the estate tax.

SUMMARY OF ARGUMENT

1. Subdivision 7-a does not violate the due process clause of the Fourteenth Amendment to the United States Constitution, as there is a shifting of the economic benefits in property occasioned by the donee's exercise of a limited power of appointment and as the only appointments under a limited power made subject to the New York estate tax are those where at the time of the creation of the power the law provided that the appointive property should be deemed to be owned by the donee.

A beneficial interest of a decedent in property is not necessary for treating such property as part of the decedent's taxable estate for the purposes of an estate tax, as control over the property by the decedent is sufficient.

2. The statute does not violate the equal protection of the laws clause as the classification is a reasonable exercise of the legislative taxing power.

There is no arbitrary discrimination between estates in which a limited power of appointment is exercised and estates in which there is no such power, as in the one case the decedent's death operates as the generating source of the shifting of the economic benefits in more property than in the other.

There is no chronological classification as the test is not the time the power was created, but whether the power had theretofore been taxed.

POINT I.

The statute is not unconstitutional as a deprivation of property without due process of law.

(a) As there was a shifting of the economic benefits in the appointive property at decedent's death, the statute is valid.

The transfer of property from the dead to the living is a privilege accorded by the state. The state therefore has broad discretion in taxing such transfers. The estate tax imposed by the State of New York is modeled after the estate tax imposed by the United States Revenue Act of 1926 (*Matter of Cregan* (1937), 275 N. Y. 337). It is a tax on the shifting of the economic benefits in property at and by the death of a decedent (*Chase National Bank v. United States* (1929) 278 U. S. 317).

To justify the inclusion of property in the measure of an estate tax, it is necesary only that the death of the decedent be the generating source of the trans-

mission of the economic benefits therein. Thus, this Court has held it proper to include in a decedent's gross estate the proceeds of life insurance (*Chase National Bank v. United States, supra*, (1929) 278 U. S. 317); the full value of property in which the decedent was a joint tenant (*United States v. Jacobs* (1939), 306 U. S. 363); the full value of property in which the decedent was a tenant by the entirety (*Tyler v. United States* (1930), 281 U. S. 497); and the value of property in a trust subject to a limited power to alter, amend or revoke (*Porter v. Commissioner* (1933), 288 U. S. 436).

That there was a shifting in the economic benefits of the appointive property by the exercise of the power by decedent cannot be denied. The decedent might have given $5,935,572.07 to any one of her surviving children or the issue of a predeceased child, and nothing to the others. She could have divided $5,935,572.07 among such children or issue in any way she saw fit. Actually, the decedent gave Gladys Szechenyi $3,523,714.66, Kathleen V. Lowman and Gloria Laura Morgan Vanderbilt, $880,928.66 each, Gertrude V. Whitney $150,000, and William H., Alfred G., and George Vanderbilt, children of a deceased son, $166,666.66 each. Under such circumstances, it is clear that there was a shifting of the economic interests in the appointive property generated by decedent's death.

The constitutional propriety under the due process clause of subjecting to death taxation property passing under the exercise of a limited power of appointment was determined by this Court in *Orr v. Gilman* (1902), 183 U. S. 278, and *Chanler v. Kelsey* (1907), 205 U. S. 466. These cases recognized that "in reality and

substance it is the execution of the power that gives to the grantee the property passing under it." Plainly, the donee can alter legal relationships in the property, and the donee's act effects the ultimate disposition of the property. It is his act which completes the transfer of the property from the dead to the living.

Even if appellants' view be conceded that the *Orr* and *Chanler* cases are not controlling because a "legacy" tax on the right to receive property was there involved, nevertheless, if it is consistent with due process to deem that the appointees receive the appointed property from the donee for the purposes of such a tax it is no less consistent to deem that the donee gives the appointed property to the appointees for the proposes of an estate tax. If it is not fictional to ascribe "ownership" to a donee for the purposes of a legacy tax, it is not fictional to ascribe "control" to a donee for the purposes of an estate tax. 52 *Harvard Law Review* 929. (Cf. *Curry v. McCanless* (1939), 307 U. S. 357, 371).

Furthermore, the distinction appellants endeavor to make is unimportant in view of the fact that section 124 of the Decedent Estate Law of New York, provides for the equitable proration of the tax among the persons interested in the estate, including appointees under a power.

Appellants argue that in order that property be included in the measure of an estate tax, it is necessary that the decedent at least have the equivalent of ownership of such property. No justification for this position can be found in the cases. In *Heiner v.*

Donnan (1932), 285 U. S. 312; *Hoeper v. Tax Commission* (1931), 284 U. S. 206; *Schlesinger v. Wisconsin* (1926), 270 U. S. 230, and *Nichols v. Coolidge* (1927), 274 U. S. 531, relied on by appellants, the taxpayer had no control whatsoever over the property included in the measure of the tax. On the contrary, it has been seen that inclusion of property in a gross estate for purposes of an estate tax has been upheld, even though the interest of the decedent is considerably less than ownership of the whole property. (*Chase National Bank v. United States, Tyler v. United States, Porter v. Commissioner, United States v. Jacobs,* all *supra*). Moreover, even accepting appellants' proposition as true, it does not lead to the conclusion that the present tax is invalid for, as has been heretofore shown, the interest of the donee in property subject to a limited power is, for purposes of an estate tax, equivalent to ownership.

Appellants contend that the inclusion in decedent's estate of the appointed property is a denial of due process of law because decedent had no beneficial interest therein. The contention is not well founded. It is not necessary for the validity of an estate tax that the property included in the taxable estate be property in which the decedent has a beneficial interest. The precise question has been passed on by this Court in *Porter v. Commissioner, supra*, 288 U. S. 436. In that case, the decedent had set up a trust under which he retained the right to alter, amend, or revoke, *but not in favor of himself or his estate.* At his death, the value of the trust property was included in his gross estate under the Revenue Act of 1926. This Court rejected the contention that the statute was violative of due process because it imposed an estate tax in

respect of property in which the decedent had no beneficial interest. See also, to the same effect *Commissioner v. Chase National Bank* (1936), 82 Fed. (2d) 157 (C. C. A.—2), cent. denied, 299 U. S. 552; *Witherbee v. Commissioner* (1934), 70 Fed. (2d) 696 (C. C. A.—2), cert. denied 293 U. S. 582, rehearing denied, 293 U. S. 631; *Cook v. Commissioner* (1934), 66 Fed. (2d) 995, (C. C. A.—3), cert. denied, 291 U. S. 660.

Appellants claim that the tax in the *Porter* case was upheld because the property had been originally owned by the decedent, and that taxation was sustained as a reasonable measure to prevent avoidance. The fallacy in this attempted distinction is obvious. The trust in the *Porter* case was created prior to the Revenue Act of 1924, which first provided for a tax on property transferred subject to a power to alter, amend or revoke. Thus, it was that decedent had completely divested himself of beneficial ownership in the property prior to the enactment of the taxing statute, and the tax could not have been upheld as one to prevent avoidance. Compare *Reinecke v. Northern Trust Co.* (1929), 278 U. S. 339, and *Helvering v. City Bank Co.* (1935), 296 U. S. 85.

Indeed, in *Sanford v. Commissioner* (1939), 84 L. ed. 53, this Court has recently pointed out that it was not the *inter vivos* transfer that occasioned the tax in the *Porter* case, but rather the shifting of the economic benefits in the trust property at the death of the decedent. See also 47 *Harvard Law Review* 1209, 1241.

Appellants likewise misinterpret the decisions in *Reinecke v. Northern Trust Co.* (as to the trusts under

which decedent had unrestricted power of revocation), *Tyler v. United States,* and *United States v. Jacobs,* all *supra.* Those cases went on the ground that there was a shifting in the economic benefits in the property at the decedent's death. Of the cases referred to by appellants, in only *Helvering v. City Bank Co., supra,* 296 U. S. 85, and *United States v. Wells* (1931), 283 U. S. 102, was the tax upheld as a measure to prevent avoidance.

(b) As the law in effect at the time of the creation of the power here under consideration provided that the exercise of a power should be considered a taxable transfer in the same manner as though the appointive property belonged absolutely to the donee, there is no violation of due process in treating the appointed property as owned by decedent for the purposes of the New York estate tax.

The only property brought into a decedent's taxable estate by subdivision 7-a of section 249-r of the Tax Law is property passing under the exercise of a power which the law in effect at the time of the creation of the power (Chapter 284, Laws of 1897) provided should be considered as though owned absolutely by the donee for the purposes of taxation. When the power herein was created by Cornelius Vanderbilt and vested in decedent, both he and decedent were on notice of the law's command that upon the exercise of the power the property appointed would be taxed as if owned absolutely by decedent. Hence, there can be no complaint that there is a lack of due process in including the appointed property in decedent's taxable estate.

It is true that at the time of the creation of the power herein, the tax imposed in donees' estates upon the exercise of powers was a transfer tax, and that the tax now imposed in decedent's estate is an estate tax. However, the statute gave no assurance that the tax imposed would continue to be a transfer tax; it merely forewarned that the appointive property would be considered as owned by the donee of the power. In making use of a power of appointment the parties submitted to whatever tax should be imposed in the estate of the donee by virtue of the statutory assumption.

The situation here cannot be distinguished in principle from that in *Milliken v. United States* (1931), 283 U. S. 15, where a tax at death on a transfer in contemplation of death at higher rates than were in effect at the time of the transfer was upheld. See, also, *Klein v. United States* (1931), 283 U. S. 231; *Phillips v. Dime Trust & Safe Deposit Co.* (1931), 284 U. S. 160.

It should be observed also that there was no compulsion upon decedent to exercise the power, and that in the absence of an exercise, the property would not have been considered as owned by her. (See *Matter of Duryea* (1938), *supra*, 277 N. Y. 310).

POINT II.

The statute is not unconstitutional as a denial of the equal protection of the laws.

(a) The statute is a reasonable exercise of the legislative power.

The pertinent principles of law have been restated time and again by this Court. The power of a legislature to classify for purposes of taxation is very broad. Any classification is valid, provided it is not flagrantly discriminatory, arbitrary or unreasonable. Reasonableness is within the province of a legislature, and the courts refrain from substituting their judgment. If the intent and operation of a taxing statute is to distribute the tax burden with a fair degree of equality, the classification cannot be condemned. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Madden v. Kentucky (1940), 84 L. ed. 406;
Illinois Central R. Co. v. Minnesota (1940), 84 L. ed. 377;
Welch v. Henry (1938), 305 U. S. 134;
Carmichael v. Southern Coal & Coke Company (1937), 301 U. S. 495;
Great Atlantic & Pacific Tea Co. v. Grosjean (1937), 301 U. S. 412;
Henneford v. Silas Mason Company (1937), 300 U. S. 577;
Salomon v. State Tax Commission (1929), 278 U. S. 484, affirming *Matter of Simonson*, 246 N. Y. 601;
Stebbins v. Riley (1925), 268 U. S. 137;
Watson v. State Comptroller (1920) 254 U. S. 122, affirming *Matter of Watson* (1919), 226 N. Y. 384;
Ohio Oil Co. v. Conway (1929), 279 U. S. 813;

Keeney v. New York (1912), 222 U. S. 525, affirming *Matter of Keeney*, 194 N. Y. 281;
Magoun v. Illinois Trust & Savings Bank (1898), 170 U. S. 283;
Bell's Gap R. Co. v. Pennsylvania (1890), 134 U. S. 232.

As has been heretofore noted, at the time of the enactment of Article 10-C of the Tax Law in 1930, there were pending numerous limited powers of appointment which had not been taxed in estates of donors, but which would have been there taxed except that the law (section 220 (5), Tax Law) provided that the transfer of property subject to a power of appointment should be taxed in the estate of the donee upon the exercise. When Article 10 C of the Tax Law superseded the earlier taxing articles as to decedents thereafter dying, it unwittingly failed to make provision for the taxation of such limited powers. When the omission was discovered, the Legislature believed that such powers should bear their just share of taxation. Other similar powers had been taxed either in the estate of the donor or in the estate of the donee. The legislature properly believed that powers, such as the one under consideration, should not escape all taxation. Hence it enacted subdivision 7-a.

It is submitted that in selecting the exercise of these particular powers for taxation the New York Legislature acted not only reasonably, but equitably. That the classification does not constitute a denial of the equal protection of the laws seems apparent. Surely it is competent for a legislature to tax the exercise of limited powers which were created at a time when the

law provided that the exercise should be subject to tax, even though the exercise of powers which were created at a time when the law had no such provision, are not taxed. Especially is this so when it is realized that all other limited powers are taxed at the time of creation in the estates of the donors.

It is beyond question that a legislature in the determination of its taxing policies may tax property transferred subject to the exercise of a limited power in either the estate of the donor of such power, or in the estate of the donee. Prior to 1930, the Legislature elected to impose the tax in the estate of the donee. Thereafter, it elected to impose the tax in the estate of the donor. It is said to be a violation of the equal protection clause to tax the exercise of limited powers of appointment created prior to 1930 in the estate of the donee, when in the case of similar powers created subsequent to 1930 the tax is in the estate of the donor. If this be true, it necessarily follows that once the legislature has elected to tax the exercise of such powers in the estates of the donees, it can never change that policy, unless it sees fit to forego the tax upon powers pending at the time the change is made. It would be strange, indeed, if the Constitution should be construed to prohibit a legislature from changing its taxing policy and to require the freezing into a taxing act of a particular policy once determined upon. It must be that a legislature has the power to decide as of a given time that property transferred subject to the exercise of a limited power of appointment shall not be taxable in the estate of the donor if the power be exercised, but shall be taxable in the estate of the donee, and that at some other time it has the power to decide that from such time forward the old method

of treating the taxation of such powers be changed and that the property subject to such powers be subjected to tax in the estates of the donors, without foregoing the tax on property passing under powers theretofore created.

In imposing a tax on powers which would otherwise have escaped taxation, the legislature acted not only reasonably, but, under well-established principles, validly.

In *Watson v. State Comptroller, supra* (1920), 254 U. S. 122, this Court upheld a statute which provided for an additional transfer tax upon certain investments transferred at death, upon which neither the general property tax nor an optional stamp tax had been paid, saying (p. 125):

> "And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not?"

In *Welch v. Henry,* (1938) *supra,* 305 U. S. 134, the statute under consideration imposed an income tax upon dividends which had theretofore been exempted from taxation. This Court denied the contention that the statute was a denial of equal protection.

> See also, *Cahen v. Brewster* (1906), 203 U. S. 543; *Florida C. & P. R. Co. v. Reynolds* (1902), 183 U. S. 471.

Appellants claim that the imposition of a legacy tax would have been more reasonable than the imposition of an estate tax. Appellee submits that it was not

only reasonable that the Legislature should impose a tax on transfers which had not borne their share of taxation, but it was reasonable that the tax should be part of the estate tax system.

In enacting Article 10-C, one of the primary purposes of the Legislature was to do away with the dual system of taxation under Articles 10 and 10-B theretofore in effect. To have enacted a special method of taxation applicable only in the case of the exercise of limited powers theretofore created would have been inconsistent with this general purpose.

Furthermore, in enacting subdivision 7-a the Legislature desired to impose a tax on an aggregate of wealth passing from one generation to another. It was doubtlessly felt that property thereafter descending from parents to children by way of a special power of appointment, as in the case at bar, should be taxed by the same method of taxation regardless of when the power was created. In employing the estate tax method it achieved substantial uniformity with respect to the taxation of appointive property, for such property under powers created after 1930 are subject to an estate tax in the donor's estate, while such property under powers created before 1930, which had not theretofore been taxed, are subject to an estate tax in the donee's estate.

Again, it should be observed that the imposition of a legacy tax would not have achieved any greater equality than the imposition of an estate tax. Moreover, there were doubts as to whether a tax could have been imposed in the donor's estate because the law in

effect at the time of creation of the power provided that the tax be imposed in the donee's estate.

Appellants argue that the amendment made in 1911 (Chapter 732) eliminating the tax in the donee's estate on the nonexercise of a power and the amendment made in 1926 (Chapter 357) imposing the tax in the donor's estate where a nonresident donee exercised a power indicates a legislative policy to impose a tax in the donor's estate. Appellants are in error for in those cases the tax was imposed in the donor's estate because there was a lack of power to impose a tax in the donee's estate. The amendments were not indicative of any general legislative policy to impose a tax in the donor's estate where power so to do existed.

(b) There is no invalid discrimination between estates of decedents who exercise nonbeneficial powers of appointment and those who do not.

To say that there is no difference between an estate in which the decedent exercises a limited power of appointment and an estate of the same size in which there is no such power is to deny the obvious. In the one case the decedent has control over more property than in the other. There being a difference between the estates, the fact that there is a difference in tax does not make the statutes invalid. In all estate taxation the amount of tax increases progressively with the net amount of property over which the decedent has control. In all cases the tax on the amount that a beneficiary receives is increased progressively with the increase in the size of the estate of the decedent.

Appellants view the tax imposed from the wrong angle. They seek to make the tax on property taken

by a beneficiary correspond to the amount of property which each such beneficiary receives. But this is not the right approach for considering discrimination between *estates*. The question is what tax is imposed in respect of a decedent's entire estate. In such cases the amount of tax on the estate increases with the inclusion of much property over which the decedent does not have full power of disposition, as, for example, in estates in which there is included property in which the decedent is a tenant by the entirety, or a joint tenant, or in which he is the owner of life insurance. In the instant case the decedent had control over the appointive property, and that factor justifies treatment of the property in the same manner as if it were owned by the decedent. Hence, the tax is necessarily higher in decedent's estate than in an estate the same as decedent's, except for the power. See, *Knowlton v. Moore, supra* (1900), 178 U. S. 41; *New York Trust Co. v. Eisner* (1921), 256 U. S. 345.

Appellants' contention was considered by this Court in *Chase National Bank v. United States, supra* (1929), 278 U. S. 327, where Mr. Justice Stone said (pp. 338-9):

> "It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection

amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins v. Riley*, 268 U. S. ."

While the *Chase* case involved the due process clause of the Fifth Amendment, the reasoning is equally applicable here.

(c) There is no invalid chronological classification.

Appellants next contend that subdivision 7-a is invalid because it sets up an arbitrary chronological classification, that is, it taxes the exercise of powers created prior to 1930, but not after 1930. This contention is predicated on an inaccuracy. Subdivision 7-a applies where "the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power *but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.*" Appellants omit the underscored portion of the

above statute in quoting it under Point III of their brief.

It has been seen that the test of taxation under subdivision 7-a is not the time of the creation of the power, but a fact pertinent to the creation, that is, whether the power was created when the law provided that for the purposes of taxation the property should be considered as owned by the donee. The fact is the test of taxation: The time merely incidental to the fact. This is not chronological classification.

That no chronological classification is made by subdivision 7-a is further seen when it is re-called, as heretofore noted, that between 1925 and 1930 there was imposed by Article 10-B of the Tax Law a tax in respect of all property, including property passing subject to the exercise of a power, in estates above a certain minimum. Thus, there were some estates during this period in which the creation of limited powers was subject to tax and others in which no tax was imposed in respect of property transferred subject to a limited power. In the one case, no tax is imposed on the exercise by a donee now dying, and in the other case, a tax is prescribed by subdivision 7-a.

The situation is not dissimilar to that where a deduction for previously taxed property is allowed from the gross estate for purposes of the Federal estate tax (section 812, Internal Revenue Code), and the New York estate tax (section 249-s, Tax Law). The operative fact in both cases is whether the property has theretofore borne its just share of taxation. See also, *Watson v. State Comptroller*, *supra*, 254 U. S. 122.

Binney v. Long, (1936), 299 U. S. 280, upon which appellants rely to sustain their claim of invalidity because of a denial of the equal protection of the laws involved a situation different from that involved in the case at bar. The powers reached by the invalid Massachusetts statute were created at a time when there was no provision for their taxation. Whereas, in the present case, the powers taxed are only those which, when they were created, were expressly made subject to tax in the estates of the donees. Hence, *Binney v. Long* is not in point here.

Further observation on the *Binney* case might not be deemed amiss. Under the Massachusetts statute, if two powers created *inter vivos* were exercised the same day, the one created prior to 1907 would not be taxed, but the one created after 1907 would be. There was no justification on the bare facts for this discriminatory treatment by Massachusetts. In so far as the decision related to the 1891 trust, apparently it was founded on the view that discrimination existed because powers created testamentarily before 1907 were taxd in a more burdensome manner, by the aggregation method, than similar powers created after 1907.

In any event, whatever may be presently thought of the decision in *Binney v. Long*, it is submitted that it is not in point here.

Conclusion.

It is respectfully submitted that the judgment of the Surrogate's Court of New York County should be affirmed.

Respectfully submitted,

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HARRY T. O'BRIEN, JR.,
Associate Attorney.

Dated, February 23, 1940.

pp. 1, 3, 5, 7

SUPREME COURT OF THE UNITED STATES.

No. 541.—October Term, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, et al., Appellants, *vs.* State Tax Commission of the State of New York.	Appeal from the Surrogate's Court of New York.

[March 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Cornelius Vanderbilt died in 1899. By his will he established a trust to issue a designated annual income to his wife. Upon her death, Mrs. Vanderbilt was also given the power to dispose of this fund among ~~their~~ four children, in such proportions as she might choose. In default of her exercise of this discretionary power, the fund was to go to the children equally. Mrs. Vanderbilt died in 1934, and by her will availed herself of the power. The taxing authorities of New York included the value of this trust fund in her gross estate, and on this basis computed Mrs. Vanderbilt's estate tax. The Court of Appeals of New York, finding that the applicable New York legislation had been properly construed by the Tax Commission, sustained its validity. 281 N. Y. 297. The result of this decision is to reduce the amount available for distribution among the beneficiaries of Mrs. Vanderbilt's independent property below what it would have been had the tax been assessed on the basis of that property without the inclusion of the trust fund which came from her husband. These beneficiaries, and the executors of the will, claim that the exaction thus sanctioned by New York violates the Fourteenth Amendment of the United States Constitution.

of their

The contested statute, New York Laws of 1932, ch. 320, derives meaning as an incident in the history of New York's present system of death taxes. That system had its beginning in 1885. The original act taxed individual economic benefits derived upon death rather than the total amount of the estate. Laws of 1885, ch. 483. Under this legislation, the transmission of property subject to powers of appointment, either general or special, was attributed to the estate of the donor. *Matter of Stewart*, 131 N. Y. 274; and the subsequent exercise of the power was not taxed. *Matter of Harbeck*, 161 N. Y. 211. The administrative awkwardness incident to this treatment of appointive property led to an amendment whereby all property passing under powers of appointment was attributed to the donee, not to the donor. Laws of 1897, ch. 284. This was the New York law when Cornelius Vanderbilt died. In 1930, experience with the legacy tax in New York and elsewhere led to a shift in the basis for imposing death duties. Acting upon the results of an inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs, New York in 1930 supplanted her system which taxed the individual legatee's privilege of succession by one which measured the levy by the size of the total estate. Laws of 1930, ch. 710. Under this legislation, property subject to a power of appointment—whether general or special—is included in the donor's gross estate. If the power is general, its later exercise sweeps the appointive property into the donee's gross estate also.

As is apt to happen in extensive legislative readjustments dealing with complex problems, the effect of the change in 1930 upon some of the more specialized situations coming within the general policy was overlooked. Powers created between 1885 and 1897 had been taxable at the donor's death. Special powers created after 1897 and exercised before 1930 had been taxed at the donee's death. Powers created and exercised after 1930 were included in the donor's estate. But powers created after 1897 and not exercised before 1930 were outside the legislative framework. Thus an unintended immunity from the incidence of taxation had been given to special powers of appointment created after 1897 but not exercised before the passage of the 1930 legislation. When experience disclosed this omission, the Legislature removed it in 1932. The

amendment of that year, which is copied in the margin,[1] included in the donee's gross estate appointive property which was not taxable at the donor's death but would have been taxable under the superseded statutory provision of 1897. It is under this amendment that New York has imposed the tax here assailed. This brings us to a consideration of appellants' claims.

As against this attempt by the State to devise a harmonious taxing system, appellants urge that New York exacts an unjustifiably heavier estate tax from the beneficiaries of Mrs. Vanderbilt's unrestricted property because in the accounting of her estate property was included of which she was not the "beneficial owner". Attacking the 1932 Act from another point of view, they claim that New York had no authority to draw a taxing line between special powers created prior to 1930 and those established thereafter.

Large concepts like "property" and "ownership" call for close analysis, especially when tax legislation is under scrutiny. Mrs. Vanderbilt, to be sure, had, in the conventional use of that term, no "beneficial interest" in the property which she transferred through the exercise of her power of appointment. She could not, that is to say, use the corpus of the trust herself or appoint it to her estate; nor could she have applied it to her creditors. These qualifications upon Mrs. Vanderbilt's power over the appointive property

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[1] The amendment provided that there should be included in the decedent's gross estate interests of which the following was part of the enumeration of defined categories:

7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . . provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.

The legislative history of this measure was thus summarized in the opinion of Surrogate Foley: "An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure: 'This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property'." Matter of Vanderbilt, 163 Misc. (N. Y.) 667, 676.

had a significance during her lifetime which death transmuted. For when the end comes, the power that property gives, no matter how absolutely it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the property—the "beneficial interest"—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death.

In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, "owned" by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.

The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of a decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* v. *United States*, 281 U. S. 497; likewise the full value of property in which the decedent was only a joint tenant may be taxed to his estate, *United States* v. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the "beneficial interest" owned by the decedent just before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change beneficiaries, excluding, however, himself and his estate from the range of choice. *Porter* v. *Commissioner*, 288 U. S. 436. The attempt to differentiate the tie that binds these cases by treating the *inter vivos* transfers in these decisions as mere substitutions for testamentary dispositions, disregards the emphasis in these cases on the practical effect of death in bringing

about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax. This broader base is emphasized, for instance, by the fact that in the *Porter* case the decedent had divested himself of all "beneficial interest" in the trust property prior to the passage of the taxing act by which the trust was included in the value of his gross estate.

A person may by his death bring into being greater interests in property than he himself has ever enjoyed, and the state may turn advantages thus realized into a source of revenue, as illustrated by earlier cases dealing with special powers of appointment that also came here from New York. *Orr* v. *Gilman*, 183 U. S. 278; *Chanler* v. *Kelsey*, 205 U. S. 466. In these cases, to be sure, a legacy tax was assailed—a tax, that is, measured by the specific interests which the beneficiaries of the power received. Here, the grievance is asserted ~~not by those taking under the power of appointment, but~~ by those succeeding to Mrs. Vanderbilt's free property. But if death may be made the occasion for taxing property in which the decedent had no "beneficial interest", then the measurement of that tax by the decedent's total wealth-disposing power is merely an exercise of legislative discretion in determining what the state shall take in return for allowing the transfer. The adoption of this measure may, of course, in the case of a graduated tax, burden individual beneficiaries beyond what they would bear if the same tax rate were applied to the value of the unrestricted property of the decedent and the property over which he had but a restricted control were excluded. There is nothing in the Fourteenth Amendment to prevent legislatures from devising death duties having this effect, nor to authorize courts to deny them the right to do so.

The circumstances of the present case illustrate the practical considerations which may induce a legislature to treat restricted and unrestricted property as a taxing unit. The potential interests of the beneficiaries of Mrs. Vanderbilt's free property are intertwined with their interests in the appointive property. The dispositions which she was free to make under her power of appointment served to enhance her freedom with respect to her own property. How Mrs. Vanderbilt would have distributed her individual property if she had possessed no control over that left by her husband is speculative. But it is certainly within the area of legislative judgment to assume that special powers of appointment are ordinarily designed for ends

similar to those in the present case—namely, to enlarge the donee's range of bounty, however narrowly restricted the enlargement may be, to a circle of beneficiaries closely related to, if not identical with, those whom the donee would be naturally disposed to favor. To the extent that this is true, there is compensation for those who may succeed to the donee's individual property, and who must pay a larger tax, because the appointive property is included in the gross estate. The legislature can hardly particularize the instances and draw up a tariff of compensations, and it is certainly not the province of courts to make the attempt. It suffices that the legislature has seen fit to frame a general enactment drawn on lines not offensive to experience and aimed at curing a revealed inequality in the state's taxing system.

Appellants vainly seek to draw strength from *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Hoeper* v. *Tax Commission*, 284 U. S. 206; and *Heiner* v. *Donnan*, 285 U. S. 312. The differences of opinion to which these cases gave rise are not here relevant.

But there remains the claim of appellants that in drawing the line between special powers created before 1930 and those having a later origin, New York ran afoul of the Equal Protection Clause. The brief summary we have given of the history of this legislation seems a sufficient answer to the charge of proscribed discrimination. To have continued the complete immunity from taxation which the 1930 legislation had unintentionally conferred upon special powers of appointment created before its passage was deemed by New York to have resulted in substantial inequality. The correction of such inequality is not a denial of the equality commanded by the Fourteenth Amendment. In the age-old but increasingly difficult task of tapping new sources of revenue, nothing may more legitimately attract the attention of financial statesmen than opportunities to reach property which has enjoyed immunity from tax burdens borne by others similarly situated. *Watson* v. *State Comptroller*, 254 U. S. 122; *Welch* v. *Henry*, 305 U. S. 134.

Acceptance of *Binney* v. *Long*, 299 U. S. 280, would not constrain us to hold differently. In the circumstances confronting the New York Legislature, as the Court of Appeals pointed out, the discrimination affecting special powers was not based upon what was deemed in the *Binney* case to be a date "arbitrarily selected but is a logical solution by the Legislature of a problem which it was

required to meet" 281 N. Y. at 317. All special powers, whether created before or after 1930, are taxed in New York. In one case, they are taxed to the donor's estate; in the other—since the same treatment would be manifestly impracticable—to the donee's. Differences in circumstances beget appropriate differences in law. The Equal Protection Clause was not designed to compel uniformity in the face of difference. *Madden, Jr.* v. *Kentucky*, No. 92, this Term.

The judgment below is

Affirmed.

Mr. Justice ROBERTS is of opinion that the instant case is indistinguishable in principle from *Binney* v. *Long*, 299 U. S. 280, and that, accordingly, the judgment should be reversed.

Mr. Justice MCREYNOLDS did not participate in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

In *Binney* v. *Long*, *supra*, the Massachusetts legislation which a majority of this Court struck down sought to distinguish between the exercise of special powers created before 1907 and those created afterwards—1907 being the date of a change in Massachusetts' general method for taxing powers of appointment. But the powers actually taxed in that case were created before 1907 by an *inter vivos* transfer not made in contemplation of death; and Massachusetts made no attempt whatever to tax the exercise of special powers created in this manner after 1907.